

## INDEX

	Page
Table of Authorities .....	2
Jurisdictional Statement .....	6
Statement of Facts .....	7
Argument	
Point I .....	10
Point II .....	41
Point III .....	46
Conclusion .....	56
Certificate of Compliance and Service .....	57

## TABLE OF AUTHORITIES

### Cases

<b><i>Blockburger v. United States</i></b> , 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) . . . . .	15, 21
<b><i>Boss v. State</i></b> , 702 N.E.2d 782, 785 (Ind.App. 1998) . . . . .	31, 32
<b><i>Dept. of Revenue of Montana v. Kurth Ranch</i></b> , 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) . . . . .	13
<b><i>Horsey v. State</i></b> , 747 S.W.2d 748 (Mo.App. S.D. 1988) . . . . .	14
<b><i>J.S. v. Beaird</i></b> , 28 S.W.3d 875 (Mo. banc 2000) . . . . .	17
<b><i>McDonald v. State</i></b> , 734 S.W.2d 596 (Mo.App. S.D. 1987) . . . . .	14-15
<b><i>Missouri v. Hunter</i></b> , 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983) . . . . .	13
<b><i>Ohio v. Schaub</i></b> , 16 Ohio App.3d 317, 475 N.E.2d 1313 (1984) . . . . .	33
<b><i>Sanabria v. United States</i></b> , 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978) . . . . .	14
<b><i>Schiro v. Farley</i></b> , 510 U.S. 222, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994) . . . . .	13
<b><i>Schofield v. State</i></b> , 750 S.W.2d 463 (Mo.App. W.D. 1988) . . . . .	16, 22
<b><i>Self v. United States</i></b> , 150 F.2d 745 (4th Cir. 1945) . . . . .	33
<b><i>State v. Anglin</i></b> , 45 S.W.3d 470 (Mo.App. W.D. 2001) . . . . .	51, 52, 54
<b><i>State v. Atchison</i></b> , 950 S.W.2d 649 (Mo.App. S.D. 1997) . . . . .	54
<b><i>State v. Barber</i></b> , 37 S.W.2d 400 (Mo.App. E.D. 2001) . . . . .	30, 31
<b><i>State v. Bounds</i></b> , 857 S.W.2d 474 (Mo.App. E.D. 1993) . . . . .	52
<b><i>State v. Brasher</i></b> , 867 S.W.2d 565 (Mo.App. W.D. 1993) . . . . .	51
<b><i>State v. Buckner</i></b> , 929 S.W.2d 795 (Mo.App. W.D. 1996) . . . . .	49
<b><i>State v. Childs</i></b> , 684 S.W.2d 508 (Mo.App. E.D. 1984) . . . . .	14

<b><i>State v. Corpier</i></b> , 793 S.W.2d 430 (Mo.App. W.D. 1990) .....	51
<b><i>State v. Cox</i></b> , 752 S.W.2d 855 (Mo.App. E.D. 1988) .....	15, 16, 18
<b><i>State v. Davis</i></b> , 675 S.W.2d 410 (Mo.App. W.D. 1984) .....	23
<b><i>State v. Doeber</i></b> , 659 S.W.2d 280 (Mo.App. E.D. 1983) .....	49
<b><i>State v. Driver</i></b> , 912 S.W.2d 52 (Mo. banc 1995) .....	50
<b><i>State v. Foster</i></b> , 838 S.W.2d 60 (Mo.App. E.D. 1992) .....	14
<b><i>State v. French</i></b> , No. WD 58860 (Mo.App. W.D. Oct. 23, 2001) .....	17, 20, 24, 25, 36
<b><i>State v. Gant</i></b> , 490 S.W.2d 46 (Mo. 1973) .....	48
<b><i>State v. Good</i></b> , 851 S.W.2d 1 (Mo.App. S.D. 1992) .....	14
<b><i>State v. Gray</i></b> , 926 S.W.2d 29 (Mo.App. W.D. 1996) .....	49, 51
<b><i>State v. Grayson</i></b> , 172 Wis.2d 156, 493 N.W.2d 23 (1992) .....	25, 27, 28, 29, 30, 33
<b><i>State v. Harrison</i></b> , 24 S.W.3d 215 (Mo.App. W.D. 2000) .....	51, 54
<b><i>State v. Harry</i></b> , 623 S.W.2d 577 (Mo.App. E.D. 1981) .....	49
<b><i>State v. Hayes</i></b> , 713 S.W.2d 275 (Mo.App. W.D. 1986) .....	49
<b><i>State v. Hicks</i></b> , 803 S.W.2d 143 (Mo.App. S.D. 1991) .....	49
<b><i>State v. Hoy</i></b> , 570 S.W.2d 697 (Mo.App. K.C.D. 1978) .....	54
<b><i>State v. Isa</i></b> , 850 S.W.2d 876 (Mo. banc 1993) .....	54
<b><i>State v. James</i></b> , 203 Md. 113, 100 A.2d 12 (Md.App. 1953) .....	32, 33
<b><i>State v. Johnson</i></b> , 948 S.W.2d 39 (Tex.App. 1997) .....	32
<b><i>State v. Jordan</i></b> , 751 S.W.2d 68 (Mo.App. E.D. 1988) .....	50
<b><i>State v. Kilgore</i></b> , 771 S.W.2d 57 (Mo. banc 1989), <i>cert. denied</i> , 493 U.S. 874, 110 S.Ct. 211, 107 L.Ed.2d 164 (1989) .....	50
<b><i>State v. Lager</i></b> , 744 SW.2d 453 (Mo.App. W.D. 1987) .....	54
<b><i>State v. Malone</i></b> , 951 S.W.2d 725 (Mo.App. W.D. 1997) .....	49

<b><i>State v. McGee</i></b> , 848 S.W.2d 512 (Mo.App. E.D. 1993) .....	49
<b><i>State v. McTush</i></b> , 827 S.W.2d 184 (Mo. banc 1992) .....	13, 21
<b><i>State v. Morovitz</i></b> , 867 S.W.2d 506 (Mo. banc 1993) .....	42, 45
<b><i>State v. Morrow</i></b> , 888 S.W.2d 387 (Mo.App. S.D. 1994) .....	14, 15, 18, 23, 24
<b><i>State v. Moss</i></b> , 700 S.W.2d 501 (Mo.App. S.D. 1985) .....	50
<b><i>State v. Nichols</i></b> , 865 S.W.2d 435 (Mo.App. E.D. 1993) .....	15
<b><i>State v. Nichols</i></b> , 725 S.W.2d 927 (Mo.App. E.D. 1987) .....	15
<b><i>State v. Olson</i></b> , 636 S.W.2d 318 (Mo. banc 1982) .....	15
<b><i>State v. Pachetti</i></b> , 729 S.W.2d 621 (Mo.App. S.D. 1987) .....	24
<b><i>State v. Parkhurst</i></b> , 845 S.W.2d 31 (Mo. banc 1992) .....	52
<b><i>State v. Pierce</i></b> , 927 S.W.2d 374 (Mo.App. W.D. 1996) .....	52
<b><i>State v. Ponder</i></b> , 950 S.W.2d 900 (Mo.App. S.D. 1997) .....	50
<b><i>State v. Richardson</i></b> , 838 S.W.2d 122 (Mo.App. E.D. 1992) .....	52
<b><i>State v. Richardson</i></b> , 923 S.W.2d 302 (Mo. banc 1996), <i>cert.</i> <i>denied</i> , 519 U.S. 972, 117 S.Ct. 403, 136 L.Ed.2d (1996) .....	54
<b><i>State v. Rowe</i></b> , 838 S.W.2d 103 (Mo.App. E.D. 1992) .....	52
<b><i>State v. Scott</i></b> , 560 S.W.2d 879 (Mo.App. St.L.D. 1977) .....	54
<b><i>State v. Scurlock</i></b> , 998 S.W.2d 578 (Mo.App. W.D. 1999) .....	53
<b><i>State v. Sexton</i></b> , 929 S.W.2d 909 (Mo.App. W.D. 1996) .....	52
<b><i>State v. Stoner</i></b> , 907 S.W.2d 360 (Mo.App. W.D. 1995) .....	54, 55
<b><i>State v. Villa-Perez</i></b> , 835 S.W.2d 897 (Mo. banc 1992) .....	13
<b><i>State v. Walden</i></b> , 490 S.W.2d 391 (Mo.App. St.L.D. 1973) .....	54
<b><i>State v. Weston</i></b> , 926 S.W.2d 920 (Mo.App. W.D. 1996) .....	49
<b><i>State v. Wiles</i></b> , 26 S.W.3d 436 (Mo.App. S.D. 2000) .....	17
<b><i>State v. Wilson</i></b> , 719 S.W.2d 28 (Mo.App. W.D. 1986) .....	14, 15

<b><i>State v. Wyatt</i></b> , 811 S.W.2d 55 (Mo.App. E.D. 1991) .....	15
<b><i>State v. Zerante</i></b> , 825 S.W.2d 41 (Mo.App. S.D. 1992) .....	50
<b><i>State ex rel. Director of Revenue v. Gaertner</i></b> , 32 S.W.3d 564 (Mo. banc 2000) .....	18
<b><i>Vaughan v. State</i></b> , 614 S.W.2d 718 (Mo.App. W.D. 1981) .....	15, 16

### **Statutes**

§ 490.660 <i>et seq.</i> , RSMo 1994 .....	48
§ 490.680, RSMo 1994 .....	49
§ 556.041, RSMo 1994 .....	13, 21, 23, 35
§ 556.046, RSMo 2000 .....	22
§ 565.050, RSMo 2000 .....	22
§ 568.040, RSMo 1986 .....	18
§ 568.040, RSMo 1994 .....	10, 11, 16, 25, 39, 41
§ 568.040, RSMo 2000 .....	10
§ 571.030.1(3), RSMo 2000 .....	22-23
Wisc. Stat. § 948.22 .....	26

### **Other Authority**

Comment to the 1973 Proposed Code following § 568.040, 40A V.A.M.S. 461 (1999) .....	37
---	----

## **JURISDICTIONAL STATEMENT**

The appellant, Germaine French, appeals from his convictions and consecutive six-month sentences in the county jail for two counts of the class D felony of nonsupport (§ 568.040, RSMo 1994), which were imposed on July 20, 2000, by the Honorable Keith B. Marquart, Judge of Division No. 5 of the Circuit Court of Buchanan County, Missouri, 5th Judicial Circuit, following jury verdicts returned on March 13, 2000 (Tr. 253-254, L.F. 63-64, 100-101). The appellant's notices of appeal from this judgment were timely filed on July 31, 2000 (L.F. 66-67, 103-104).

Jurisdiction of this appeal originally was vested in the Missouri Court of Appeals, Western District, pursuant to Art. V, § 3 of the Constitution of Missouri. However, on January 22, 2002, following an opinion by the Court of Appeals, reversing one of the appellant's two convictions and sentences, this Court sustained the respondent's application to transfer and ordered this case transferred from the Court of Appeals to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Art. V, § 10, of the Constitution of Missouri and Rule 83.03.

## STATEMENT OF FACTS

### **A. Procedural History**

Following consolidation of his two cases, on March 14, 2000, the appellant, Germaine French, was found guilty of two counts of the class D felony of nonsupport (§ 568.040, RSMo 1994), following a jury trial in the Circuit Court of Buchanan County, Missouri, 5th Judicial Circuit (Tr. 253-254). On July 20, 2000, he was sentenced by the Honorable Keith B. Marquart, Judge of Division No. 5 of the Circuit Court to two consecutive terms of six months' imprisonment (L.F. 63-64, 100-101).

On July 31, 2000, the appellant timely filed his notice of appeal from this judgment (L.F. 66-67, 103-104).

On October 23, 2001, a three-judge panel of the Missouri Court of Appeals, Western District, issued an opinion, reversing one of the appellant's two convictions and sentences on double-jeopardy grounds. ***State v. French***, No. WD 58860 (Mo.App. W.D. Oct. 23, 2001).

The respondent's alternative motion for rehearing or transfer was denied by the Court of Appeals on December 4, 2001, but on January 22, 2002, this Court sustained the respondent's application to transfer and ordered the case transferred to this Court pursuant to Rule 83.03.

### **B. Trial Evidence**

In 1998, Victoria Wilson was living with her young son, Marekus, at 1201 Northwood Drive, Apartment 7, in St. Joseph, Missouri (Tr. 120-121, 123). Marekus, who was born on June 17, 1993, was the product of a brief sexual relationship that occurred between Ms. Wilson and the appellant in 1992 (Tr. 122-123).

In November of 1992, shortly after Ms. Wilson discovered she was pregnant, she informed the appellant during a telephone conversation that she was pregnant, that he was the father of her child, and that she expected him to pay child support (Tr. 124, 131). The appellant did not say much in response to the news of his paternity, but he did not attempt to deny that he was the father (Tr. 125, 152). During a subsequent telephone call, however, the appellant announced to her, "I'm not paying for any child support for a child that's not mine" (Tr. 153).

In 1995, the appellant offered to provide financial support for Marekus if Ms. Wilson agreed not to file a court action seeking child support (Tr. 125, 135). However, the appellant failed to uphold his part of the bargain, so Ms. Wilson went to the Child Support Enforcement Agency in an effort to obtain child support for Marekus (Tr. 123-125).

During 1998, the appellant did not provide any financial support for Marekus, did not provide him with any food or groceries, did not provide him with any shelter, or help pay Ms. Wilson's rent (Tr. 125-126). He did not provide any health insurance coverage for his son, pay any of his medical bills, provide him with clothing, or furnish any type of support, financial or otherwise, during this 12-month period (Tr. 126). Ms. Wilson said she did not know of any reason why the appellant might not be capable of supporting Marekus (Tr. 126-127).

Ms. Wilson said that there was no possibility that anyone other than the appellant could have been Marekus's father because he was the only person with whom she had a sexual relationship during the period he was conceived (Tr. 127). She emphasized that Marekus even had the appellant's features, noting that "[h]is ears lap[ped] over" just as the appellant's did (Tr. 127).

In the summer of 1996, after Ms. Wilson filed for child support, the Buchanan County prosecutor's office became involved in the case, and contacted the appellant in an effort to obtain his cooperation in paying support for his child (Tr. 158). However, when such cooperation was not forthcoming, the prosecutor's office filed a petition for paternity and child support under the Uniform Parentage Act, seeking a declaration that the appellant was the father of Marekus (Tr. 156-159).

On July 23, 1996, a copy of the petition was served on the appellant (Tr. 164). When the appellant failed to appear in court, the court issued an order to compel the appellant to submit to genetic tests on October 21, 1996 (Tr. 168, 170). After the appellant failed to appear for such tests, the court entered an order on November 26, 1996, declaring the appellant to be the father of Marekus and ordering him to pay \$431 per month in child support (Tr. 174, 207). The judgment was sent by certified mail to the appellant, but was returned unclaimed after three unsuccessful attempts to deliver it to him, indicating that it had been sent to the correct address, but that the intended recipient had declined to accept it (Tr. 178-180, 203).

During 1998, the records of the Buchanan County Circuit Court reflected that the appellant did not voluntarily make a single support payment (Tr. 207-209). The sole support payment credited to his account was a payment in the amount of \$182, which was involuntarily deducted from his state income tax refund by means of a "tax intercept" (Tr. 209-210).

## ARGUMENT

### I.

**THE TRIAL COURT DID NOT ERR IN REFUSING TO DISMISS ONE OF THE TWO FELONY NONSUPPORT CHARGES AGAINST THE APPELLANT, SINCE THE APPLICABLE STATUTE (§ 568.040, RSMo 1994) EXPRESSLY PROVIDES THAT A PERSON COMMITS THE FELONY OF CRIMINAL NONSUPPORT IF HE OR SHE "COMMITTS THE CRIME OF NONSUPPORT IN EACH OF SIX INDIVIDUAL MONTHS WITHIN ANY TWELVE-MONTH PERIOD" AND THE APPELLANT FAILED TO PAY ANY CHILD SUPPORT DURING TWO SUCCESSIVE SIX-MONTH PERIODS. CONTRARY TO WHAT THE APPELLANT ARGUES IN HIS BRIEF, (1) THE APPELLANT'S TWO CONVICTIONS WERE NOT BASED ON THE "SAME CONDUCT," AND (2) IT IS CLEAR THAT THIS STATUTE DOES NOT DEFINE CRIMINAL NONSUPPORT AS A "CONTINUING OFFENSE."**

The principal issue presented by this appeal is whether the appellant, who failed to support his minor child for two contiguous six-month periods, could be convicted of two separate counts of felony nonsupport under § 568.040, RSMo 1994 (now § 568.040, RSMo 2000), or whether his crime was defined as a "continuing offense" that constituted only a single felony, regardless of how long he failed to support his child, so long as his conduct was uninterrupted, *i.e.*, so long as he continued to fail to provide adequate support.

Under Point I of his substitute brief, the appellant continues to assert that his convictions of two counts of felony nonsupport subjected him to double jeopardy, because the State allegedly "attempted to prosecute separately, in two counts, behavior that constituted a continuing course of conduct, since the charges were based upon [his] failure to provide support for [his child] over the

course of time" (App.Sub.Br. 13). The appellant asserts that the legislature did not intend for a defendant to be subjected to "multiple punishments in the same prosecution for the continuing nonsupport of a single child," because such multiple convictions would necessarily be "based on the same act of omission" (App.Sub.Br. 13).

Another way of stating this argument, of course, is that a defendant who is convicted of a misdemeanor or felony for the failure to provide adequate support for his minor child is inoculated from future prosecution for nonsupport of that same child, so long as his conduct (*i.e.*, nonsupport) is not interrupted by a voluntary payment of support.

So phrased, the patent absurdity of the appellant's argument becomes apparent. Such an argument flies in the face of the express language of Missouri's criminal nonsupport statute, § 568.040, which clearly and unequivocally provides that a person violates the statute on a monthly basis where he or she fails to pay adequate child support during that month.

#### **A. The Statute**

This statute provides, in pertinent part, as follows:

**568.040. Criminal nonsupport, penalty, prosecuting attorneys to report cases to division of child support enforcement.** -- 1. A person commits the crime of nonsupport if he knowingly fails to provide, without good cause, adequate support for his spouse; a parent commits the crime of nonsupport if such parent knowingly fails to provide, without good cause, adequate support which such parent is legally

obligated to provide for his child or stepchild who is not otherwise emancipated by operation of law.

\* \* \*

4. Criminal nonsupport is a class A misdemeanor, *unless the person obligated to pay child support commits the crime of nonsupport in each of six individual months within any twelve-month period, or the total arrearage is in excess of five thousand dollars, in either of which case it is a class D felony.*

\* \* \* .

(Emphasis added.)

### **B. The Facts**

In the present case, the appellant was charged with, and convicted of, two counts of felony nonsupport under § 568.040.1 based upon separate acts: his failure to provide support for his minor child for the six-month period of January 1, 1998, through June 30, 1998, during the 12-month period of July 1, 1997, through June 30, 1998 (L.F. 14, 34), and his subsequent failure to provide adequate support for that same child for the six-month period of July 1, 1998, through December 31, 1998, during the 12-month period of January 1, 1998, through December 31, 1998 (L.F. 36, 75).

The State's theory, of course, was that these were two separate six-month periods and clearly constituted separate offenses under § 568.040. The appellant, on the other hand, argues that his failure to support his child during the second six-month period was merely a continuation of his original crime, and was not a separate offense. The appellant argues that, as long as his failure to support was "uninterrupted," he could never be prosecuted for failing to support

the same child, no matter how long that failure lasted. He asserts that, under the facts of the present case, his second conviction subjected him to double jeopardy, because he was convicted and punished twice of the "same offense."

### **C. Double-Jeopardy Principles**

Unquestionably, the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution has been construed to prohibit "multiple punishments for the same offense." **Dept. of Revenue of Montana v. Kurth Ranch**, 511 U.S. 767, 769 n. 1, 114 S.Ct. 1937, 1941[1] n. 1, 128 L.Ed.2d 767 (1994); **Schiro v. Farley**, 510 U.S. 222, 229, 114 S.Ct. 783, 789[6], 127 L.Ed.2d 47 (1994). Where, as here, the punishments are imposed following a single trial, the only question, for double-jeopardy purposes, is whether the legislature intended that multiple punishments be imposed. **Missouri v. Hunter**, 459 U.S. 359, 368-369, 103 S.Ct. 673, 679[4], 74 L.Ed.2d 535 (1983); **State v. McTush**, 827 S.W.2d 184, 186[2] (Mo. banc 1992).

In determining whether the Missouri legislature intended to impose multiple punishments for the "same conduct," a court first looks to the statutes under which the defendant was charged and convicted to see if multiple punishments are specifically authorized; if those statutes are silent on this issue, the inquiry then shifts to § 556.041.1, RSMo 2000. **State v. Villa-Perez**, 835 S.W.2d 897, 903[13] (Mo. banc 1992); **McTush**, 827 S.W.2d at 187[4].

This method of statutory analysis, however, is inapplicable to situations where, as here, the State seeks to assess multiple punishments under the *same statute* for a single course of conduct that results in multiple violations of that statute. **State v. Good**, 851 S.W.2d 1, 4 (Mo.App. S.D. 1992); **Horseley v. State**, 747 S.W.2d 748, 751 (Mo.App. S.D. 1988). In that situation, the threshold inquiry is still the same, *i.e.*, did the legislature intend that multiple punishments

be assessed, ***Sanabria v. United States***, 437 U.S. 54, 69-70, 98 S.Ct. 2170, 2181-2182[17], 57 L.Ed.2d 43 (1978), or, otherwise stated, "what, under the statute, the legislature intended to be the allowable unit of prosecution," ***Horsey***, *id.*, but a different analysis must be utilized to answer this question.

That analysis necessarily begins with the recognition that in determining the allowable "unit of prosecution" for double-jeopardy purposes, Missouri follows the "separate or several offense rule," rather than the "same transaction rule." ***State v. Morrow***, 888 S.W.2d 387, 390 (Mo.App. S.D. 1994); ***State v. Foster***, 838 S.W.2d 60, 66[13] (Mo.App. E.D. 1992). That means that a defendant can be convicted of several offenses arising from the same set of facts without violating the Double Jeopardy Clause. ***McDonald v. State***, 734 S.W.2d 596, 598 (Mo.App. S.D. 1987); ***State v. Wilson***, 719 S.W.2d 28, 34[10] (Mo.App. W.D. 1986); ***State v. Childs***, 684 S.W.2d 508, 510-511[3] (Mo.App. E.D. 1984).

In other words, multiple convictions are permissible if the defendant has in law and in fact committed separate crimes. ***Foster***, 838 S.W.2d at 66-67[14]. The fact that the two crimes occurred at substantially the same time or that substantially the same evidence must be shown to prove both crimes does not require the State to present only one charge. ***McDonald***, *id.*; ***Wilson***, *id.* Likewise, the fact that several offenses occurred during a continuous course of conduct, or involved the same victim, does not preclude conviction for each offense committed. ***State v. Olson***, 636 S.W.2d 318, 320[2-3] (Mo. banc 1982).

In attempting to determine the allowable "unit of prosecution" under a single statute for a continuing course of conduct, the court first must examine the language of the statute defining the offense, ***State v. Nichols***, 865 S.W.2d 435, 437[2] (Mo.App. E.D. 1993), to ascertain whether the legislature intended to prohibit individual acts or the course of action which they constitute. ***Morrow***,

888 S.W.2d at 392, *quoting Blockburger v. United States*, 284 U.S. 299, 302, 52 S.Ct. 180, 181, 76 L.Ed. 306 (1932).

"If the former, then each act is punishable separately." *Blockburger, id.* "If the latter, there can be but one penalty." *Blockburger, id.*

If it is clear that the statute was meant to prohibit individual acts, the next question is whether the evidence shows one or more separate acts violative of the statute in issue, a question that usually must be resolved "by determining whether there is an identifiable physical termination of the crime[s] charged." *State v. Cox*, 752 S.W.2d 855, 859[5] (Mo.App. E.D. 1988).

That question, in turn, must be determined by the particular facts of each case, including the factors of time, place of commission, and, most importantly, the defendant's intent, as evidenced by his conduct and utterances. *State v. Wyatt*, 811 S.W.2d 55, 56[4] (Mo.App. E.D. 1991); *Childs*, 684 S.W.2d at 511[4-5]; *Vaughan v. State*, 614 S.W.2d 718, 722[4] (Mo.App. W.D. 1981). Although "the time and place of commission of the conduct in question" may demonstrate whether the defendant can be punished for multiple offenses, *Cox*, 752 S.W.2d at 859[5], these factors are not always determinative.

In fact, as one appellate court has emphasized, "recent Missouri cases minimize the importance of time and place factors in determining separate offenses for double jeopardy purposes," and have upheld multiple convictions for offenses involving the same victim, even where the acts occurred at the same location, either "simultaneously" or "within a relatively short time." *Schofield v. State*, 750 S.W.2d 463, 466 (Mo.App. W.D. 1988). The crucial question is whether the evidence shows that the defendant was capable of forming a "second intent" to commit the same offense more than once. *Vaughan*, 614 S.W.2d at 722[4].

#### **D. Analysis of § 568.040**

In this case, there is little room for argument on the question of whether § 568.040 prohibits individual acts or the course of conduct that they constitute. Subsection 4 of that statute unequivocally provides that a person commits the crime of criminal nonsupport on a monthly basis, since it states that if a person "commits the crime of nonsupport in each of six individual months within any twelve-month period," he or she is guilty of a class D felony. § 568.040.4. If, at the end of a particular month, a defendant has failed to provide adequate support for his or her child, the misdemeanor offense is complete. If this nonsupport continues for successive months, the defendant "commits the crime" of misdemeanor nonsupport in each of those months where adequate support is not paid. And if, as in the present case, the appellant fails to pay child support for six successive months, the felony is complete at the termination of the six-month period.

If the defendant continues in his or her refusal to pay adequate support in the following month, another misdemeanor is committed. Should another five months elapse without the payment of adequate support, the defendant is guilty of a second felony.

In the opinion issued by the Court of Appeals in this case, the Western District acknowledged, as it must, that "[l]egislative intent regarding cumulative sentences is first determined by examining the statute under which [the] [d]efendant was convicted," but then immediately declared--without citing or discussing subsection 4 of the statute--that § 568.040 "does not state whether the legislature intended cumulative punishment." ***State v. French***, No. WD 58860 (Mo.App. W.D. Oct. 23, 2001), slip op. at 5.

In his brief, the appellant appears to concede that subsection 4 of the statute might *appear* to authorize cumulative punishments, but argues that this language must somehow be disregarded because it does not appear "within its definition of the crime" (App.Sub.Br. 18).

But the appellant cites no authority for the proposition that language in a criminal statute, delineating its "units of prosecution," must appear within the definition of the offense or any other specific place in the statute. Such a holding would conflict with the well-known rules of statutory construction that "the statute as a whole should be looked at in construing any part of it," **J.S. v. Beaird**, 28 S.W.3d 875, 876[2] (Mo. banc 2000), and that "each word, clause, sentence and section of a statute should be given meaning." **State v. Wiles**, 26 S.W.3d 436, 440[2] (Mo.App. S.D. 2000).

The appellant's refusal to acknowledge the import of subsection 4 of the statute also is at odds with another key rule of statutory construction: When the legislature has altered an existing statute, such change is deemed to have an intended effect, and the legislature will not be charged with having done a meaningless act. **State ex rel. Director of Revenue v. Gaertner**, 32 S.W.3d 564, 567[3] (Mo. banc 2000).

Prior to its amendment in 1993, there were no units of prosecution listed in the statute. Rather, § 568.040 merely provided that criminal nonsupport was a class A misdemeanor, unless the actor "le[ft] the state for the purpose of avoiding his obligation to support," in which case it was a class D felony. § 568.040.4, RSMo 1986.

The 1993 amendment to the statute, then, established, for the first time, "units of prosecution" for the crime of nonsupport, changing the law to provide that a person can commit the offense of misdemeanor nonsupport on a monthly

basis, and can commit the crime of felony nonsupport every six months, if he or she fails to provide adequate support in any of those months.

Moreover, even if the statute was silent as to the applicable "units of prosecution," an analysis of the other factors listed in cases such as **Cox** and **Wyatt** also leads to the inescapable conclusion that the statute, as amended, was designed to prohibit individual acts of felony nonsupport, rather than the course of action which they constitute. See **Morrow**, 888 S.W.2d at 392.

With respect to the issue of whether there is "an identifiable physical termination of the crime[s] charged," **Cox**, 752 S.W.2d at 859[5], the offense of criminal nonsupport is "physically terminated" under the express terms of the statute at the end of any month in which the parent has failed to provide adequate child support during that month, and, with respect to the commission of a felony, at the end of any sixth month of nonsupport within a 12-month period.

But perhaps the most important factor, certainly, is the defendant's intent. Since a parent's obligation to support his child is calculated on a monthly basis, each month affords that parent a new opportunity to decide whether or not he intends to fulfill his or her obligation.

In this case, the jury could reasonably have inferred that the appellant formed an intent not to support his minor child in each successive month that he failed to provide adequate support. When, over two successive six-month periods, he failed to provide adequate child support, he committed two, not one felony.

#### **E. Court of Appeals' Analysis**

In holding that multiple convictions for separate acts of nonsupport of the same child constitute "double jeopardy," the Court of Appeals mistakenly relied on legal principles that relate solely to the permissibility of multiple punishments,

under separate criminal statutes, for the "same conduct." The appellant makes the same mistake in his brief (App.Sub.Br. 19). But, as previously stressed, the relevant legal principles actually are those that apply to the permissibility of imposing multiple punishments, *under the same statute*, for *separate acts* committed during the same course of conduct.

In its opinion, the Court of Appeals, like the appellant, mistakenly began its review by simply assuming that this case involved multiple convictions for the "same conduct"--the very question it was seeking to resolve--and then attempted (without success) to apply the two-part analysis set out in ***Villa-Perez*** and ***McTush***.

In conducting that analysis, the Court of Appeals first ignored the plain language of subsection 4 of § 568.040, and declared that the statute failed to expressly authorize multiple convictions. ***French***, slip op. at 5-6. Then the Court turned to § 556.041, and concluded that multiple convictions for criminal nonsupport were barred by subsection (4) of that statute because, although criminal nonsupport is not defined as a "continuing course of conduct," case law indicates that "[t]he crime of nonsupport is continuous." ***French***, slip op. at 6.

But, contrary to what the appellant argues and the Court of Appeals appeared to believe, this case does not involve the type of situation covered by ***Villa-Perez*** or ***McTush***, *i.e.*, cases where the State punished the appellant for the "same conduct" based upon different criminal statutes. Rather, the present case involves an entirely different issue, *i.e.*, whether multiple punishments may be imposed for *different* or *separate* (albeit related) conduct which violates the *same* statute.

In this case, however, the Court of Appeals attempted to put the proverbial round peg into a square hole: It incorrectly assumed that the appellant's

convictions were based on the "same conduct" and then looked to § 556.041 to determine if multiple convictions for this conduct were permissible.

However, in instances like the present case, where the State is attempting to punish the defendant more than once under the same statute, resort to § 556.041 will *always* preclude multiple convictions, regardless of the facts and circumstances of the individual case.

That statute provides as follows:

**556.041. Limitation on conviction for multiple offenses.**--When the *same conduct* of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

(1) One offense is included in the other, as defined in section 556.046; or

(2) Inconsistent findings of fact are required to establish the commission of the offenses; or

(3) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(4) The offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

(Emphasis added.)

Subsection (1) is a codification of the **Blockburger** test, **McTush**, 827 S.W.2d at 188, which authorizes multiple convictions for the "same act or transaction," *i.e.*, "same conduct" if each offense requires proof of at least one element that the other offense does not. **Blockburger**, 284 U.S. at 304, 52 S.Ct. at 182[3].

In this case, if, in fact, the appellant's failure to provide adequate support during the first six months of 1998 constituted the "same conduct" as his failure to provide such support during the last six months of that year, subsection (1) of § 556.041 would clearly bar multiple convictions because each offense has identical elements. The analysis would immediately come to a screeching halt, and there would be no need to resort to subsection (4) of that statute.

But, as previously emphasized, § 556.041 has no application if the multiple convictions are based upon a defendant's separate conduct. Consequently, although pursuant to § 556.041(1), a person may not be prosecuted for the "same conduct" if "[o]ne offense is included in the other, as defined in section 556.046", RSMo 2000, the threshold question, of course, is whether the multiple charges are based upon the "same conduct" or--as in the present case--whether they are based upon related, but *separate* conduct.

For example, suppose a defendant is charged with three counts of assault in the first degree (§ 565.050.1, RSMo 2000) based upon what is alleged to be a series of separate assaults on the same victim by different methods. Although each charge involves different *facts*, they do not require proof of different elements; accordingly, application of § 556.041(1) to that fact pattern would result in a conclusion that the multiple convictions constitute double jeopardy. Yet, it is clear that multiple convictions in such a situation do not violate the Double

Jeopardy Clause because they are not based upon the "same conduct." **Schofield**, 750 S.W.2d at 466.

Another example would be where a defendant fires successive shots, just seconds apart, into a dwelling house in violation of § 571.030.1(3), RSMo 2000, the statute defining the unlawful use of a weapon. If the State elects to charge the defendant with one felony for each shot fired, it could be argued that the multiple charges must be disallowed by virtue of § 556.041(1), since, as in the **Schofield** example, each charge would necessarily entail the *same* elements. But, again, § 556.041(1) has no application because the multiple charges are based upon separate (albeit related) conduct, not the "same conduct." See **Morrow**, 888 S.W.2d at 391-393.

As these examples graphically illustrate, resort to § 556.041(1) in determining the permissibility of multiple punishments will provide a correct and reliable result only when the State seeks to punish the defendant under separate statutes for the "same conduct." If, as in the instant case, the State seeks to assess multiple punishments under the same statute for separate conduct, § 556.041(1) simply has no application.

#### **F. "Continuing Offense" Claim**

In resorting to § 556.041 to determine the permissibility of multiple punishments for two counts of felony nonsupport, the Court of Appeals leap-frogged subsection (1) and instead headed straight to subsection (4) of the statute, which prohibits multiple convictions based upon the "same conduct" if "[t]he offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of conduct constitute separate offenses." § 556.041(4).

The Court of Appeals then observed that "[a]lthough nonsupport is not defined in § 568.040 as a continuing course of conduct," the Court in **State v. Davis**, 675 S.W.2d 410, 417 (Mo.App. W.D. 1984), "found that '[t]he crime of nonsupport is continuous and a "violation at any time within the limitation period" justifies a conviction.'" **French**, slip op. at 6. The Court of Appeals also cited two subsequent decisions, one from 1987 (**State v. Pachetti**, 729 S.W.2d 621, 627 (Mo.App. S.D. 1987)) and one from 1994 (**Morrow**), where, in *dicta*, criminal nonsupport was listed "as an example of an offense which involves a continuous course of conduct." **French**, slip op. at 6.

However, once it discerned that the offense of nonsupport was not "defined" as a continuing course of conduct, the Court of Appeals' analysis should have ended. Obviously, there is little, if any, relevance to the fact that there exists language in an appellate decision stating that the crime of nonsupport is "continuous," or the fact that a few cases have cited the statute in *dicta* as an example of an offense that involves a continuous course of conduct.

There is, certainly, a significant difference between the issues of whether the crime of nonsupport is "continuous" in the context of determining what evidence may be introduced (the question in **Davis**) and whether the legislature has defined the crime as a "continuing course of conduct" for purposes of determining the permissibility of multiple punishments (the question in this case).

In any event, **Davis** involved an interpretation of a prior version of § 568.040; nine years after **Davis** was decided, the legislature amended § 568.040 by rewriting subsection 4 to provide that a person "commits the crime of nonsupport" on a monthly basis. Such language did not appear until the 1993 amendment, nine years after **Davis** was handed down.

In its opinion, this Court of Appeals correctly noted that § 568.040 was amended in 1993, after the **Davis** decision, and then stated, "Had the legislature intended to allow specific periods of nonsupport to constitute separate offenses it could have done so by including language to that effect." **French**, slip op. at 7. But, as the State has already emphasized, the legislature *did precisely that* when it amended § 568.040.4, and expressly provided that a person commits the crime of nonsupport on a monthly basis.

Moreover, even if § 568.040 "defined" the crime of nonsupport as "a continuing course of conduct"--which it does not--subsection 4 of that statute nevertheless specifically provides, in effect, that "specific periods of such conduct constitute separate offenses": By the express terms of that statute, a person commits a misdemeanor each month in which he or she knowingly fails to provide adequate support for his or her child, and commits a felony for every six such months within any 12-month period. Thus, a person who, like the appellant, knowingly fails to provide adequate support during the entire 12 months of any particular year, may be convicted of two felonies annually.

#### **G. Decisions from Other Jurisdictions**

At this point, it should be emphasized that the precise argument raised by the appellant has repeatedly been rejected by other jurisdictions. For example, in **State v. Grayson**, 172 Wis.2d 156, 493 N.W.2d 23 (1992), the defendant challenged, on double-jeopardy grounds, his four separate felony convictions for his continuous failure to provide support for his minor child during the years 1986 through 1989. The Wisconsin nonsupport statute provided that a person who intentionally failed to provide support for 120 or more consecutive days was guilty of a felony; a person who intentionally failed to provide support for less than 120 consecutive days was guilty of a misdemeanor.

The specific statutes in issue in **Grayson** read as follows:

Any person who intentionally fails for 120 or more consecutive days to provide . . . child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a Class E felony.

Wisc. Stat. § 948.22(2).

Any person who intentionally fails for less than 120 consecutive days to provide . . . child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a Class A misdemeanor.

Wisc. Stat. § 948.22(3).

The defendant in **Grayson**, like the appellant in the case at bar, asserted that criminal nonsupport was a "continuing offense" and that, once he was found guilty of failing to provide support for 120 consecutive days, he was not susceptible to prosecution for any additional offenses, so long as his conduct (failing to support his minor child) was uninterrupted, *i.e.*, so long as he did not make any support payments.

The Wisconsin Supreme Court rejected these arguments. The Court held that, in determining the defendant's double-jeopardy arguments, it should consider four factors: (1) the language of the statute; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments for that conduct. **Grayson**, 493 N.W.2d at 25.

Analyzing the first factor, the Court noted that "[b]ecause of its express reference to the 120-day time period, the felony nonsupport statute can

reasonably be interpreted as allowing a separate felony charge for each 120-day period a person fails to provide child support." **Grayson**, 493 N.W.2d at 27. The Court also noted that "[j]ust as the presence of gradations in the penalty structure indicates that an ongoing offense could be treated as a single crime, the lack of gradations is viewed as indicating that an ongoing offense may be charged as multiple separate offenses." **Grayson**, *id.*

The Court then noted that prior nonsupport statutes did not contain time periods or treat longer violations more seriously than shorter violations of the statute. The Court held that interpreting the newest version of the statute to permit one felony count for each 120-day period of nonsupport "is consistent with the legislature's desire, evidenced by the felony/misdemeanor distinction, to punish more serious violations of the statute more severely." **Grayson**, 493 N.W.2d at 27.

In considering the nature of the proscribed conduct, the Court in **Grayson** stressed that where a defendant fails to support his or her child over separate, distinct time periods, "the facts are both separated in time and different in nature." **Grayson**, 493 N.W.2d at 28.

They are separate in time because, each 120-day period of failure to provide support occurred in a separate and distinct calendar year. They are different in nature because a new mens rea was formed for each 120-day period of nonpayment. The crime of nonsupport is a crime of omission, but it is also a crime of intent. The 120-day period that must elapse before the defendant is guilty of an additional count of

felony nonsupport provides more than sufficient time to reflect and form a new mens rea.

**Grayson**, 493 N.W.2d at 28.

Turning to the fourth and final factor, the appropriateness of multiple punishments, the Court in **Grayson** emphasized that "[m]ultiple punishments based on each 120-day period of nonsupport are not only appropriate, but essential if the statute is to provide deterrence and proportionality in its operation."

**Grayson**, 493 N.W.2d at 28. The Court went on to state:

. . . If a parent failing to provide child support for 120 days or more is liable to prosecution for only one offense no matter how long the period of nonsupport continues, the continuation of the failure to provide support is encouraged, not deterred. Multiple charges are not only appropriate, they are essential if the nonsupport statute is to deter long-term failures to provide support.

Multiple charges are also needed to assure proportionality between the harm caused by and the punishment received for nonsupport. In this case, at the end of 120 days, the defendant had failed to provide approximately \$1,700 in support. At the end of seven years, he had failed to provide approximately \$36,400 in support. The longer the period of nonpayment, the greater the harm that is inflicted. A child is left with increasing amounts of the monies needed for his or her support unpaid. Our holding that

sec. 948.22(2) permits multiple counts, even if that person fails to pay over one continuous period, provides for punishment proportional to this increased harm. Otherwise, a person who fails to provide support for one year and a person who fails to provide support for 18 years would be subject to the same penalty.

**Grayson**, 493 N.W.2d at 28.

The Court in **Grayson** concluded that a "common sense reading of [the statute] establishes a legislative intent to permit multiple counts of felony nonsupport when the defendant fails to pay child support for one continuous period." **Grayson**, 493 N.W.2d at 28.

In the present case, however, the Court of Appeals eschewed a "common sense reading" of the statute, and chose to interpret it in a cramped and nonsensical manner. Unlike **Grayson**, the Court of Appeals attempted no real analysis of the statute and ignored the fact that the 1993 amendment introduced time periods into the statute for the first time, making it a misdemeanor to fail to provide adequate support in any given month, and a felony if the defendant failed to provide adequate support for six months of any 12-month period. As in **Grayson**, the failure to provide any further penalty gradations clearly indicates that the legislature intended a defendant to be guilty of additional felonies in future six-month increments for the continued failure to support his or her child.

The opinion by the Court of Appeals also failed to acknowledge, as the **Grayson** holding does, that the failure to support involves a mens rea that exists in each month that a defendant fails to provide adequate child support. That is to say, each month that a defendant fails to provide adequate child support involves

a conscious decision by the defendant that he will continue to default on his legal obligation to support that child. Each month that he or she neglects to pay child support provides the opportunity "to reflect and form a new mens rea." **Grayson**, 493 N.W.2d at 28.

But the most persuasive reason for concluding that the Court of Appeals incorrectly interpreted the statute is that the result encourages, rather than deters, the crime of nonsupport. If, as the Court of Appeals held, a person who fails to provide child support for six successive months is liable to prosecution for only one felony no matter how long the period of nonsupport continues, "the continuation of the failure to provide support is encouraged, not deterred." **Grayson**, 493 S.W.2d at 28. As in **Grayson**, "[m]ultiple charges are not only appropriate, they are essential if the nonsupport statute is to deter long-term failures to provide support." **Grayson**, 493 N.W.2d at 28.

This aspect of **Grayson** is consistent with Missouri law, which indicates that a criminal statute is to be interpreted in a manner calculated to deter, rather than encourage, criminal conduct. **State v. Barber**, 37 S.W.2d 400, 405 (Mo.App. E.D. 2001). **Barber** emphasized that criminal statutes must be interpreted so as to encourage defendants to curtail, rather than expand, their criminality. An interpretation of Missouri's nonsupport statutes that levies no additional penalty on a defendant's continued failure to support his or her child fails to accomplish that objective and "would violate public policy." **Barber**, *id.*

In addition, the Court of Appeals' misinterpretation of the criminal nonsupport statute allows for disproportionality of punishment in relation to the harm caused by the defendant's conduct. Under the Court's interpretation of § 568.040, a person who fails to support his child during the first six months of the

child's birth will receive the same punishment as an individual who fails to provide a penny of support during the child's first 21 years.

If a person interrupts their nonsupport by making intermittent payments, such as every seventh month, that parent could be convicted of as many as 36 felonies until his child reaches his majority. But the parent who never pays a cent during this same period, could be convicted, under the Court of Appeals' interpretation of the statute, of only a single offense.

Not surprisingly, Wisconsin is not the only state to conclude that a defendant does not inoculate himself from further convictions for criminal nonsupport simply by never making a child support payment after committing his initial crime.

In ***Boss v. State***, 702 N.E.2d 782, 785 (Ind.App. 1998), the Indiana Court of Appeals, although acknowledging that "[t]he duty to support one's child is a continuous one," and that "[a] parent who fails to support a child commits a continuing crime," nevertheless emphasized that "[i]f a parent could not be prosecuted more than once under this statute, a parent who was prosecuted while his child was still young could fail or refuse to support a child without risk of further criminal penalties."

The Court in ***Boss*** went on to hold that a defendant's conviction for nonsupport did not preclude his conviction for nonsupport over later periods of time, as long as those periods did not overlap. ***Boss***, 702 N.E.2d at 785.

In his brief, the appellant argues that ***Boss*** actually supports his position, because the court there refused to allow the State to charge the defendant with three separate felonies based upon interrupted conduct that the prosecution had arbitrarily divided into thirds (App.Sub.Br. 23-24). But the obvious difference between ***Boss*** and this case, of course, is that the Indiana statute in issue in

**Boss** did not specifically provide for specific units of prosecution or state that the failure to support over a particular period of time constituted either a misdemeanor or felony.

In the present case, by contrast, § 568.040.4 expressly states the "unit of prosecution," by providing that a defendant "commits" a misdemeanor on a monthly basis, and can commit a felony by failing to provide support in any six months of a continuous 12-month period.

In **State v. Johnson**, 948 S.W.2d 39 (Tex.App. 1997), the defendant argued that his convictions for criminal nonsupport constituted double jeopardy because he had been held in contempt for failing to support the same child several years earlier. The Texas Court of Appeals rejected this argument, concluding that "each month appellee failed to make a child support payment constituted a separate offense, thus permitting successive prosecutions." **Johnson**, 948 S.W.2d at 40 n. 3.

In **State v. James**, 203 Md. 113, 100 A.2d 12 (Md.App. 1953), the Court of Appeals held that the defendant's Delaware conviction for failure to support his child did not bar his prosecution in Maryland for failure to support the same child during a subsequent time period. Quoting with approval from **Self v. United States**, 150 F.2d 745, 747 (4th Cir. 1945), the Court emphasized that "[a] conviction of a father for refusal to support his children is not a bar to a later prosecution for future neglect of his obligation." **James**, 100 A.2d. at 11.

Finally, in **Ohio v. Schaub**, 16 Ohio App.3d 317, 475 N.E.2d 1313, 1316 (1984), the Ohio Court of Appeals ruled that the defendant's acquittal of a charge of criminal nonsupport, based upon his alleged failure to support his children from 1979 to 1981, did not bar his prosecution for failure to support the same child during a subsequent six-month period in 1982.

In other words, the overwhelming weight of authority--including **Grayson**, a case that is virtually on all fours with the present appeal--holds that a defendant's conviction (or acquittal) for criminal nonsupport during some earlier period of time, is no bar to prosecution for failure to support the same child during some subsequent period, even if the defendant fails to provide support during the intervening period.

In fact, the only significant difference between the Wisconsin statute in issue in **Grayson** and Missouri's criminal nonsupport statute is that the Wisconsin's enactment provides that the defendant is guilty of a separate felony for each 120-day period of nonsupport, which would allow a defendant in Wisconsin to be convicted of three felonies during any one calendar year. In Missouri, the legislature has seen fit to limit the number of permissible felony nonsupport convictions to two during a 12-month period.

Otherwise, there is no meaningful difference between the two statutes. Yet, while the Wisconsin courts have seen fit to interpret the statute as written, the Court of Appeals attempted to force a construction upon Missouri's criminal nonsupport statute which makes no sense and which gives delinquent parents every incentive not to pay a penny in child support once their conduct amounts to a felony.

#### **H. Appellant's Additional Arguments**

The natural and necessary result of the appellant's argument in the Court of Appeals was that once a parent is found guilty of a misdemeanor or a felony under § 568.040.4, that parent could continue to violate the law with impunity. According to the appellant's original theory, criminal nonsupport is a "continuing offense," which, presumably, would continue until the child obtained majority, so long as the defendant never voluntarily provided adequate support. A defendant

who failed to provide adequate support for his child from birth through the child's 21st birthday would be guilty of a felony when the child turned six months old--but only one felony, according to the appellant's reasoning--and, thereafter, the defendant would never again have to worry about being charged with criminal nonsupport for that particular child.

This, obviously, is a ridiculous interpretation of the statute, and is contrary to the plain language of § 568.040.4. Yet, the opinion issued by the Western District of the Missouri Court of Appeals adopted precisely that interpretation, holding that once a defendant commits a felony by failing to provide adequate support for his child during any six months of a 12-month period, the defendant becomes inoculated from future prosecution, so long as he or she continues to fail to voluntarily provide adequate support for that child.

In his substitute brief, the appellant, obviously recognizing the absurdity of his original argument and the Court of Appeals' holding, argues--for the first time in this proceeding--that "[t]he crime is a continuous one, unless and until the State breaks the course of conduct *by bringing a charge*" (emphasis added) (App.Sub.Br. 21).

"Bringing a charge"? The appellant cites no authority--and the State has been unable to find any--which provides that a defendant's course of conduct constituting a "continuing offense" can be "broken" by the mere act of the State filing a criminal charge against the offending parent. Under the appellant's novel theory, if the State had "filed a charge" on June 30, 1998, at the end of the first sixth-month period, and another charge on December 31, 1998, the end of the second six-month period, there would be no double-jeopardy issue. How much sense does that make?

Obviously, the conduct covered by the nonsupport statute is a parent's failure to support his or her child and, if that crime were to be considered a "continuing offense," it would continue until the parent "interrupts" that course of conduct by ceasing to engage in it, *i.e.*, by voluntarily providing support. Indeed, the provision upon which the appellant relies, § 556.041(4), speaks of a "continuing course of conduct" by the defendant that is "uninterrupted."

Filing a criminal nonsupport charge against a defendant "interrupts" his conduct only if, as a result of that charge, the defendant begins paying adequate support. It is the defendant's act of providing adequate support, not the State's filing of the charge, that "interrupts" the defendant's criminal conduct. Conversely, if a defendant continues to fail to pay child support, even after the filing of a criminal charge, his conduct will not have been "interrupted" by the prosecution's action.

So, although the appellant suggests that the "State has [falsely] attempted to paint a doomsday scenario" by suggesting that the Court of Appeals' interpretation of the statute would allow a nonsupporting parent to "violate the law with impunity," there is nothing even remotely false or incorrect about this scenario--it is very real if the statute were to be interpreted in the nonsensical manner suggested by the appellant.

Although the appellant has attempted to temper the absurd result his argument would cause by wrongly suggesting that the filing of a charge could "interrupt" a defendant's course of conduct, this is a specious argument that he has simply pulled out of thin air. The Court of Appeals at least had this part right: If criminal nonsupport is a continuing offense, a defendant's course of conduct can be interrupted only if he or she voluntarily pays adequate support in a particular month. **French**, slip op. at 7. So, under the Court of Appeals' version

of the statute, a defendant would be extremely unwise to ever pay a penny of child support as soon as his conduct first rises to the level of a felony.

The appellant also argues that, as the Comment to 1973 Proposed Code following § 568.040 acknowledges, the criminal prosecution of a defendant for nonsupport can sometimes frustrate the object of the statute by making the nonsupporting parent incapable of meeting his or her financial obligation (App.Sub.Br. 26). What the appellant fails to note, however, is that this Comment also indicates that the legislature has recognized that, in many cases, criminal prosecution or the threat of prosecution is often the *only* available means to force an obstinate parent to support his or her child, since an action for contempt is not available.

Indeed, the Comment to the 1973 Proposed Code makes the key point that § 568.040 is an essential tool in encouraging delinquent parents to pay child support and that "such sanctions serve a needed function as a deterrent and in Missouri may be the only effective means of dealing with certain situations," since Missouri case law precludes contempt proceedings to enforce orders to pay child support. See Comment to 1973 Proposed Code following § 568.040, 40A V.A.M.S. 461 (1999).

The appellant also argues that the State's interpretation of the statute would allow the prosecution to sit on the sidelines until a parent "accumulate[d] substantial delinquencies," then charge him or her with multiple felonies, "even though it had the opportunity to charge the parent immediately and break the `course of conduct'" (App.Sub.Br. 26).

Of course, as previously emphasized, the theory that the State, and not the defendant, "break[s] the `course of conduct'" by charging the delinquent parent with a felony is utter nonsense. Moreover, the State is under no obligation to take

steps to warn the defendant against committing multiple violations of this or any other statute by charging him with a crime as soon as the first violation is committed.

Besides, the statute of limitations obviously would curtail any attempts by the State to "watch from the sidelines" while the defendant committed a series of felonies, and the likelihood of concurrent sentences for repeat violations also would decrease any incentive the State might otherwise have to delay prosecution in order to allow a defendant to commit multiple offenses.

In essence, the appellant's argument is tantamount to saying that the police would be prohibited from issuing multiple traffic citations to a motorist who drove through a series of red lights or stop signs on the theory that they are required to immediately stop the driver after his first offense.

One final note: The appellant suggests in his brief that § 568.040.4 should not be interpreted to allow multiple felony offenses where the defendant's conduct is uninterrupted because it allegedly is not as clear as Wisconsin's present nonsupport statute, which contains the sentence: "A prosecutor may charge a person with multiple counts for a violation under this subsection if each count covers a period of at least 120 consecutive days and there is no overlap between periods" (App.Sub.Br. 17).

However, as the appellant concedes in a footnote, this language did not appear in the statute when **Grayson** was decided, but rather was added by the legislature to address the concerns of the dissent, who argued that the language "120 or more consecutive days" could be interpreted to mean that the failure to provide support beyond 120 consecutive days was still a single felony (App.Sub.Br. at 18 n. 3).

Missouri's nonsupport statute, by contrast, does not contain any such ambiguity. Rather, subsection 4 clearly delineates the applicable units of prosecution, and provides, in no uncertain terms, that a person "commits" the crime on a monthly basis, and commits a felony by failing to provide adequate support in any six months of a 12-month period.

### **I. Summary of Argument**

A plain reading of subsection 4 of § 568.040 demonstrates that a parent "commits the crime of nonsupport in each . . . individual month" that he or she fails to provide adequate child support. The express language of this statute provides that each month that a parent knowingly fails to provide adequate support for his or her child that parent commits a class A misdemeanor. Moreover, if a parent fails to provide adequate support during each of six months in any 12-month period, that parent commits a class D felony.

Any reasonable person reading § 568.040 in its entirety, including subsection 4, would readily conclude, as did the trial court, that a person who fails to provide child support during successive six-month periods, is therefore guilty of *two* separate felonies.

In other words, the statute defining the offense of criminal nonsupport, § 568.040, expressly delineates the unit of prosecution for such an offense by providing that a person "commits the crime of nonsupport" each month that he or she fails to provide adequate support, and commits a felony if he fails to support his or her child for six months in any 12-month period. § 568.040.4.

This is exactly the *opposite* of how a continuing offense is defined. If the legislature had intended to define criminal nonsupport as a "continuing offense," it would have provided that a defendant commits the crime of nonsupport if he or she fails to provide adequate support for a child during any one month and that

such an offense continues until the defendant provides the child with adequate support or until the child reaches majority.

Since it did not, subsection 4 of the nonsupport statute can only be read as expressly authorizing multiple misdemeanor convictions on a monthly basis and felony convictions every six months. And, the fact that such authorization appears in the subsection of the statute prescribing the punishment, rather than that part of the statute defining the offense is of no consequence. The relevant question is whether there is some clear indication in the statute that the legislature intended to permit multiple convictions for separate violations of the statute, and, if so, what those units of prosecution might be. Subsection 4 of the statute couldn't be any clearer: Misdemeanor nonsupport is committed on a monthly basis, and felony nonsupport can be committed every six months.

The holding by the Court of Appeals, if allowed to stand, effectively guts the statute and renders this enactment completely ineffectual as a method of ensuring that children will be adequately supported and that delinquent parents be adequately punished for failing to provide support.

Accordingly, the trial judge did not err in convicting and sentencing the appellant on each of the two counts. Point I of the appellant's substitute brief has no merit and must be ruled against him.

## II.

THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE SINCE THERE WAS AMPLE EVIDENCE THAT THE APPELLANT KNEW OF HIS "LEGAL OBLIGATION" TO SUPPORT HIS SON, MAREKUS WILSON, SINCE (1) THE MOTHER OF MAREKUS TOLD HIM SHE WAS PREGNANT WITH HIS CHILD AND INFORMED HIM THAT SHE EXPECTED HIM TO PAY SUPPORT; (2) THE APPELLANT AGREED TO PAY SUPPORT FOR MAREKUS IF SHE WOULD REFRAIN FROM FILING A COURT ACTION REQUIRING HIM TO DO SO; AND (3) HE WAS SERVED WITH A PETITION THAT ATTEMPTED TO ESTABLISH HIS PATERNITY AS MAREKUS'S FATHER, IGNORED A COURT ORDER REQUIRING HIM TO TAKE A PATERNITY TEST, AND REFUSED TO CLAIM A CERTIFIED LETTER INFORMING HIM THAT A DEFAULT JUDGMENT HAD BEEN ENTERED AGAINST HIM, WHICH DECLARED HIM THE BOY'S FATHER AND ORDERED HIM TO PAY \$431 SUPPORT PER MONTH.

Under Point II of the appellant's substitute brief, he contends that the trial judge erred in overruling his motion for judgment of acquittal at the close of the evidence because, he maintains, the State failed to prove that he knew he had a legal obligation to support his child (App.Sub.Br. 28-31).

This argument, however, clearly has no merit. The appellant was convicted of two counts of felony nonsupport under § 568.040, RSMo 1994, which provides that a parent commits this offense if he or she, *inter alia*, "knowingly fails to provide, without good cause, adequate support which such parent is legally obligated to provide for his child." § 568.040.1. Every parent has a legal obligation to provide for his or her children, and this statute makes the failure to

do so a criminal offense. **State v. Morovitz**, 867 S.W.2d 506, 508[4] (Mo. banc 1993); **State v. Nichols**, 725 S.W.2d 927, 928[2] (Mo.App. E.D. 1987).

A defendant's failure to comply with a judicial decree directing him or her to provide a particular amount of monthly child support, while relevant to the question of whether a defendant has violated his or her legal obligation to support a child, is not conclusive on this issue, **Morovitz**, 867 S.W.2d at 508[6]; **Nichols**, 725 S.W.2d at 929, since, for example, the parent might have made the payments directly to the child, or have furnished support in some other fashion. See **Nichols**, 725 S.W.2d at 930[3-4]. However, proof of the relationship of parent to minor child is sufficient to establish a *prima facie* basis for a legal obligation of support. **Morovitz**, 867 S.W.2d at 508[7].

If, as **Morovitz** expressly holds, "proof of the relationship of parent to minor child is sufficient to establish [a] *prima facie* basis for a legal obligation of support," then a defendant's knowledge of that relationship, coupled with his knowing failure to provide adequate support, necessarily is sufficient to establish that the defendant did not knowingly provide adequate support.

In the present case, evidence that the appellant was aware that he was the father of the boy was overwhelming, and evidence that he failed to provide adequate support was undisputed. The testimony presented at trial revealed that the boy's mother called the appellant even before their son, Marekus, was born and not only told him about her pregnancy, but emphasized to him that she expected him to pay child support (Tr. 124, 131). In 1995, the appellant promised to support Marekus if she would agree not to have a paternity action filed against him (Tr. 125, 135). She agreed, but no support was forthcoming (Tr. 123-125).

When she attempted to obtain child support and named the appellant as the boy's father, the appellant was contacted by the prosecutor's office, but refused

to cooperate with them (Tr. 158-159). That left the prosecutor no option except to file a petition in circuit court, seeking to establish the appellant's paternity and to obtain child support for the child's mother (Tr. 156-159). Although the appellant was served with a copy of that petition and an order requiring him to submit to genetic testing to determine the boy's paternity, he failed to appear for the test (Tr. 168-171).

Ultimately, on November 26, 1996, a court order was issued, declaring him to be the boy's father and ordering him to pay \$431 per month in child support (Tr. 174, 207). Although a copy of that order was sent to the appellant by certified mail, it came back unclaimed after three unsuccessful efforts to deliver it to him (Tr. 178-180, 203).

During 1998, the records of the Buchanan County Circuit Court reflected that the appellant did not voluntarily make a single support payment (Tr. 207-209). The sole support payment credited to his account was the payment in the amount of \$182, which was involuntarily deducted from his state tax refund by means of a "tax intercept" (Tr. 209-210).

The appellant does not dispute that he failed to provide adequate support for Marekus during 1998, the time period covered by the two-count information, or at any time prior to trial. He appears to argue, however, that he could not be convicted of "knowingly" failing to provide adequate support for his son unless the State proved beyond a reasonable doubt that he was aware of the court order directing him to pay \$431 per month in child support for Marekus (App.Sub.Br. 28, 30-31).

To begin with, even if the State was required to show that the appellant was aware of this court order, there was ample evidence that the appellant had at least constructive notice that he had been legally declared to be Markeus's father and

was required to pay child support in some amount. The appellant had been contacted by the prosecutor's office and was aware that the mother of Marekus had initiated proceedings to obtain child support from the boy's father, and the appellant had refused to comply with that attempt. He then was served with a copy of a petition seeking to establish paternity and obtain an order of child support. He ignored an order to appear for genetic testing to determine the paternity of the boy, and declined to accept a certified letter from the court that the appellant knew, or had reason to know, declared him to be the father and directed the monthly payment of child support in some reasonable amount (Tr. 178-180, 203).

The evidence, then, was sufficient for the jury to determine that the appellant had at least constructive notice of the court order directing him to pay child support for Marekus. However, as will be demonstrated *infra*, the law did not require the existence of a court order directing the payment of support in any amount, much less the appellant's knowledge of such an order.

Under the appellant's theory, a defendant could not be convicted of criminal nonsupport unless and until a civil judgment had been entered, declaring him to be the father and directing payment of child support in a certain amount, and a copy of that order actually served upon him. Thus, a defendant could refuse to adequately support his children and yet successfully avoid prosecution for criminal nonsupport so long as he could avoid service of civil process and/or refused to accept service of any letters notifying him of judgments that were entered against him.

But, as earlier noted, a defendant's obligation to adequately support his or her child arises as a result of the child-parent relationship, and is not dependent upon a court order declaring him or her to be the parent. **Morovitz**, 867 S.W.2d

at 508[7]. Inasmuch as "proof of the relationship of parent to minor child is sufficient to establish [a] prima facie basis for a legal obligation to support," evidence that the defendant is aware of the existence of that relationship, from *any source*, is sufficient to show that he had knowledge of the existence of the legal obligation to support.

Here, the evidence shows that the child's mother not only notified him of her pregnancy, but told him, in no uncertain terms, that she expected him to support that child after it was born. And, in 1995, the appellant agreed to support his son, if the mother agreed not to take him to court. Yet the appellant still neglected to provide any support for Marekus, in any amount.

The appellant's knowledge of the subsequent court proceedings, his failure to appear for genetic testing, and his refusal to accept the certified letter from the circuit court notifying him of his support obligation constituted further evidence from which the jury could reasonably infer that the appellant was aware of his legal obligation to support his child.

And since, as previously stressed, the appellant does not dispute the fact that he did not adequately support his child during the entire year of 1998, his challenge to the sufficiency of the evidence is legally infirm and must be rejected. So much, then, for Point II of his substitute brief.

### III.

**THE TRIAL COURT DID NOT COMMIT "PLAIN ERROR" IN FAILING TO EXCLUDE, *SUA SPONTE*, ON RELEVANCY GROUNDS, TESTIMONY THAT (1) THE APPELLANT DID NOT COOPERATE WHEN HE WAS CONTACTED ABOUT SCHEDULED GENETIC TESTING; (2) THAT THE STATE FILED A PETITION TO ESTABLISH HIS PATERNITY OF MAREKUS WILSON; AND (3) THAT THE APPELLANT REFUSED TO COMPLY WITH AN ORDER REQUIRING HIM TO SUBMIT TO GENETIC TESTING, SINCE THE APPELLANT MADE NO OBJECTION ON RELEVANCY GROUNDS WHEN THIS EVIDENCE WAS INTRODUCED, AND SINCE, IN ANY EVENT, THIS EVIDENCE WAS DIRECTLY RELEVANT TO ESTABLISH THAT THE APPELLANT WAS AWARE OF HIS LEGAL OBLIGATION TO SUPPORT HIS CHILD.**

Under Point III of his substitute brief, the appellant asserts that the trial court "abused its discretion" in allowing the State to present evidence that the appellant "did not cooperate when he was contacted about scheduling genetic testing, that the State filed a petition to establish paternity and received a court order compelling [him] to submit to genetic testing, and that this order was served on [him] but he failed to appear for testing" (App.Sub.Br. 32). The appellant argues that this testimony was irrelevant to the question of whether he knew he had a legal obligation to support his son, Marekus, and was prejudicial because the "jury placed great emphasis" on whether or not he had a constitutional right to refuse the court-ordered genetic test (App.Sub.Br. 32).

There are numerous problems with this argument, not the least of which is that this evidence was clearly admissible to show that the appellant was aware that he had a legal obligation to support his son, Marekus Wilson. But another

insuperable difficulty with the appellant's claim is that some of his objections to this testimony were *sustained*, and the appellant requested no further relief. The appellant failed to object on *any grounds* to portions of the testimony, and he objected solely on *hearsay* grounds to other parts of the witness's testimony that he now claims was irrelevant.

The appellant, certainly, is limited on appeal to those grounds he raised at trial, and he cannot argue that the trial judge "abused its discretion" in refusing to sustain objections he did not make, or made on other grounds, or in failing to grant him relief that was never requested.

In his brief, the appellant notes that Deborah Welter, an employee of the Buchanan County prosecutor's office, testified about the process of establishing paternity, "over defense counsel's objection that this information was irrelevant" (App.Sub.Br. 33). But the part of Ms. Welter's testimony to which he objected related solely to the prosecutor's general policy of filing a paternity action under certain circumstances, and did not directly relate to the appellant's case at all (Tr. 157).

When Ms. Welter was asked whether "in this particular case," the appellant had been contacted by the prosecutor's office, there was no objection (Tr. 158). And, when she was asked, "to the best of your knowledge, did the office get cooperation in contacting the Defendant," there again was no objection (Tr. 158).

Subsequently, the prosecution introduced State's Exhibits Nos. 1 and 2, a "Petition for Paternity and Child Support," and an order from the court compelling the appellant to submit to genetic tests, respectively (Tr. 166-167, 169-171). The appellant did not object to these exhibits on the ground that they were irrelevant; rather, his sole objections to these documents were that they constituted hearsay (Tr. 166-173). The trial judge overruled those objections and admitted Exhibit No.

1 as a business records under § 490.660 *et seq.*, RSMo 1994, the "Uniform Business Records as Evidence Law" (Tr. 163), and took judicial notice of Exhibit No. 2 (Tr. 172).

When the witness was asked if she personally knew whether the appellant had complied with the order to appear for genetic testing, she answered, "We were told by the laboratory that he did not" (Tr. 171). The appellant's objection to this testimony was promptly sustained, and the appellant requested no further relief (Tr. 171). When the witness again was asked whether the appellant "show[ed] up" for the test, the appellant's objection was sustained before the witness could answer (Tr. 171). The appellant appeared satisfied with the court's rulings and requested no further relief, such as an instruction to strike or disregard the witness's initial answer (Tr. 171).

In other words, (1) the appellant made no objection on any ground to the testimony that the appellant had not cooperated with the prosecutor's office in establishing Marekus's paternity; (2) objected only on hearsay grounds to the exhibits which showed that he had been ordered to appear for genetic testing; and (3) successfully objected to testimony that he failed to appear for such testing, and requested no further relief.

There is, therefore, nothing for this Court to review. Since the appellant failed to object on any basis to the testimony that he had not cooperated with the prosecutor's office in establishing his status as Marekus's father, he waived any objections he might have had to it, and rendered it admissible. ***State v. Gant***, 490 S.W.2d 46, 49[8] (Mo. 1973); ***State v. Harry***, 623 S.W.2d 577, 579[4] (Mo.App. E.D. 1981). The "[f]ailure to timely object to the admissibility of evidence waives any right to challenge the admissibility of the evidence on appeal." ***State v. Weston***, 926 S.W.2d 920, 922[1] (Mo.App. W.D. 1996).

Otherwise stated, "by failing to object [to it], he waived any objections he may have had to the evidence." **State v. Malone**, 951 S.W.2d 725, 729 (Mo.App. W.D. 1997).

Obviously, a trial court will not be convicted of error for failing to take some action that was never requested, **State v. Gray**, 926 S.W.2d 29, 34[19] (Mo.App. W.D. 1996), especially for reasons first mentioned on appeal. **Gray**, 926 S.W.2d at 33[17]. Trial judges are not expected to assist counsel in trying cases, and should act *sua sponte* only in "exceptional circumstances." **State v. Buckner**, 929 S.W.2d 795, 799-800[10] (Mo.App. W.D. 1996). Since the appellant did not object to, and made no motion to strike, the witness's testimony that he had not cooperated with the prosecution, it "became part of the evidence in the case." **State v. Doeber**t, 659 S.W.2d 280, 283[7] (Mo.App. E.D. 1983).

A party will not be allowed to fail to object or request relief at trial, gamble on the verdict, and then, if adverse, request relief for the first time in a motion for new trial or in his appellate brief. **State v. McGee**, 848 S.W.2d 512, 514 (Mo.App. E.D. 1993); **State v. Hicks**, 803 S.W.2d 143, 147[4] (Mo.App. S.D. 1991); **State v. Hayes**, 713 S.W.2d 275, 278[6] (Mo.App. W.D. 1986).

As previously noted, the appellant objected only on hearsay grounds to the court records which showed that he was served with an order requiring him to appear for genetic testing, and these exhibits were admissible, either as business records under § 490.680, RSMo 1994, or as records which the court could judicially notice. The appellant was, of course, limited to the scope of the objection he made at trial, and may not alter or broaden the scope of that objection on appeal.

Specifically, timely objections to evidence are required, and the objection must direct the attention of the trial court to the ground or reason for the objection.

**State v. Ponder**, 950 S.W.2d 900, 910[10] (Mo.App. S.D. 1997). If that objection is overruled, the point on appeal must be based on the same theory as the trial objection. **State v. Driver**, 912 S.W.2d 52, 54[1] (Mo. banc 1995). An appellant may not alter or broaden on appeal the scope of the objection he made at trial. **State v. Kilgore**, 771 S.W.2d 57, 67[22] (Mo. banc 1989), *cert. denied*, 493 U.S. 874, 110 S.Ct. 211, 107 L.Ed.2d 164 (1989); **State v. Zerante**, 825 S.W.2d 41, 43[2] (Mo.App. S.D. 1992).

With respect to the questions regarding whether the appellant had failed to appear for the testing, the appellant's first objection, although posed after the question had already been asked and answered,<sup>1</sup> was *sustained*, and the appellant did not request to strike the answer (Tr. 171). His subsequent objection to the same question was also sustained, before an answer could be given (Tr. 171).

Where, as here, the court grants all the relief requested at trial, the defendant is not allowed to argue on appeal that additional relief should have been granted. **State v. Brasher**, 867 S.W.2d 565, 569[11] (Mo.App. W.D. 1993); **State v. Corpier**, 793 S.W.2d 430, 444[44] (Mo.App. W.D. 1990). The appellate court assumes that since all of the corrective relief requested was granted, the action taken by the trial court was adequate to cure any error. **Brasher**, *id.*; **Corpier**, *id.* A defendant will not be heard to complain on appeal about a trial

---

<sup>1</sup>An objection which is made after the question has been asked and answered is untimely, and, in the absence of a motion to strike the answer, the ruling of the trial court on the objection is not preserved for appellate review. **State v. Jordan**, 751 S.W.2d 68, 75[7] (Mo.App. E.D. 1988); **State v. Moss**, 700 S.W.2d 501, 503[1-2] (Mo.App. S.D. 1985).

court's failure to take some action that was never requested. **Gray**, 926 S.W.2d at 34[19].

There is, therefore, no basis for the appellant's assertion that the trial court "abused its discretion" in allowing the admission of this evidence. As repeatedly emphasized, the appellant either failed to object at all to this evidence, objected on other grounds, or successfully objected to the challenged testimony. Consequently, there is nothing for this Court to review with respect to this point.

However, even if the appellant had objected to all of this testimony on relevancy grounds, and even if all of those objections had been overruled, the appellant's "abuse of discretion" claim would still fail, since the evidence was admissible to demonstrate the appellant's knowledge of his legal obligation to support his young child.

A trial court is vested with broad discretion to admit or exclude evidence at trial. **State v. Anglin**, 45 S.W.3d 470, 472[3] (Mo.App. W.D. 2001); **State v. Harrison**, 24 S.W.3d 215, 218[2] (Mo.App. W.D. 2000). Absent a clear abuse of discretion, an appellate court will affirm the trial court's ruling on the admissibility of evidence. **Anglin**, 45 S.W.3d at 472[4]; **Harrison**, *id.* An abuse of discretion occurs when the trial judge's ruling is clearly against the logic of the circumstances then before the trial court, and is so unreasonable and arbitrary that the ruling shocks the sense of justice, and indicates a lack of careful deliberation. **Anglin**, 45 S.W.3d at 472[5]; **Harrison**, 24 S.W.3d at 218[3].

Evidence is relevant if it tends to prove or disprove a fact in issue, or if it corroborates evidence that is relevant and bears on a principal issue. **State v. Pierce**, 927 S.W.2d 374, 376[2] (Mo.App. W.D. 1996); **State v. Bounds**, 857 S.W.2d 474, 477[11] (Mo.App. E.D. 1993). Evidence need only be relevant, not conclusive, to be admissible. **State v. Richardson**, 838 S.W.2d 122, 124[5]

(Mo.App. E.D. 1992). Before evidence can be excluded on the ground that it is irrelevant, it must appear so beyond a reasonable doubt. **Bounds**, 857 S.W.2d at 477[12]; **State v. Rowe**, 838 S.W.2d 103, 111[13] (Mo.App. E.D. 1992).

The trial court has broad discretion in determining the relevancy of evidence, and an appellate court will not interfere with the trial court's ruling absent a "clear showing" of abuse. **State v. Parkhurst**, 845 S.W.2d 31, 36[11] (Mo. banc 1992); **State v. Sexton**, 929 S.W.2d 909, 915[9] (Mo.App. W.D. 1996); **Pierce**, 927 S.W.2d at 376[3].

As noted under Point II, *supra*, of the State's substitute brief, evidence that the appellant failed to cooperate with the prosecutor's office to determine the paternity of Marekus, that he was served with a petition seeking to establish paternity and obtain child support, together with an order for genetic testing, and that he failed to appear for the paternity test tended to show that the appellant (1) was aware that a paternity action was pending against him with regard to Marekus; (2) was aware that, if the tests determined he was the father, he would be legally obligated to pay child support; and (3) deliberately chose not to appear for a test that would have determined whether or not he was the child's father.

Just as a defendant's failure to appear to provide a handwriting sample constitutes evidence of a defendant's knowledge that he forged the document in question, **State v. Scurlock**, 998 S.W.2d 578, 590[28] (Mo.App. W.D. 1999), evidence that an alleged father failed to take a paternity test that would either confirm or disprove his identity as the child's father, tends to show his knowledge that he is, in fact, the father of the child whose paternity is in issue. Consequently, the appellant's lack of cooperation in assisting in the determination of paternity, including his failure to take the requested genetic test, was strong, compelling evidence that (1) the appellant was the child's father; (2) that he *knew*

he was the father; and (3) that he knew that, by taking the test, he would conclusively demonstrate that fact.

It is, therefore, frivolous for the appellant to argue that his lack of cooperation in the paternity proceedings was irrelevant to any issue in the case. Obviously, it was a key piece of evidence in establishing that he was aware of his legal obligation to support his child.

Of course, even if the appellant is correct in his claim that the evidence was irrelevant--and he clearly is not--it still does not follow that the evidence was "prejudicial" merely because the jury asked the court if the appellant might have a constitutional right to refuse to comply with the court's order directing the testing. The mere fact that the jury might have considered the evidence during its deliberations does not mean that it was unfairly prejudicial.

In matters involving the admission of evidence, an appellate court reviews for prejudice, not mere error, and an appellate court will reverse only if the error was so prejudicial that it denied the defendant of a fair trial. **Anglin**, 45 S.W.3d at 472[6]; **Harrison**, 34 S.W.3d at 218. The admission of irrelevant or inadmissible evidence, otherwise free of prejudice, cannot constitute reversible error. **State v. Hoy**, 570 S.W.2d 697, 699-700[4] (Mo.App. K.C.D. 1978); **State v. Scott**, 560 S.W.2d 879, 881[4] (Mo.App. St.L.D. 1977); **State v. Walden**, 490 S.W.2d 391, 393[3] (Mo.App. St.L.D. 1973). Irrelevant or immaterial evidence is excluded, not because it is inflammatory or prejudicial, but because its admission has a tendency to draw the jury's attention from the issues it has been called upon to resolve. **Scott**, *id.*; **Walden**, *id.* In fact, in most cases, "[i]rrelevancy . . . operates `to mitigate a claim of prejudice.'" **State v. Lager**, 744 SW.2d 453, 457[6] (Mo.App. W.D. 1987).

Where, as here, the defendant complains about the admission of evidence, he has the "dual burden" of establishing that the admission of this evidence was error, and that this error was prejudicial. **State v. Isa**, 850 S.W.2d 876, 895[48] (Mo. banc 1993); **State v. Atchison**, 950 S.W.2d 649, 653[2] (Mo.App. S.D. 1997). In reviewing for "prejudice," reversal is warranted "only if the admitted evidence was so prejudicial that it deprived the defendant of a fair trial." **State v. Richardson**, 923 S.W.2d 302, 311[10] (Mo. banc 1996), *cert. denied*, 519 U.S. 972, 117 S.Ct. 403, 136 L.Ed.2d (1996). Absent a showing that the evidence inflamed the jury or diverted its attention from the issues to be resolved, admitted evidence, even if immaterial or irrelevant, will not constitute prejudicial error. **State v. Stoner**, 907 S.W.2d 360, 364[5] (Mo.App. W.D. 1995). Mere allegations of prejudice are insufficient to meet this burden. **Stoner**, 907 S.W.2d at 364[6].

In the present case, testimony regarding the appellant's failure to cooperate with the paternity proceedings was not, on its face, inherently prejudicial such as evidence of other crimes would be, for example. That is to say, if the jury chose to believe that the appellant's failure to cooperate did not show an awareness of his legal obligation to support his child, the testimony was simply innocuous and could not have affected the jury's verdict or prejudiced the appellant to any extent. Therefore, even if the challenged evidence was irrelevant, inadmissible or non-probative, it could not furnish the appellant with grounds for reversal.

That fact, however, is merely academic for purposes of this appeal, since the appellant did not object on relevancy grounds to any of this evidence, and since, in any event, it clearly was relevant to establish his knowledge of his legal obligation to support his child.

Point III of his substitute brief, like his first two claims, has no merit and must be denied.

## **CONCLUSION**

For the reasons presented under Points I through III, *supra*, of the State's substitute brief, the appellant's convictions and consecutive six-month sentences in the county jail for two counts of the class D felony of nonsupport (§ 568.040, RSMo 1994) should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON  
Attorney General

PHILIP M. KOPPE  
Assistant Attorney General  
Mo. Bar No. 23369

Penntower Office Center  
3100 Broadway, Suite 609  
Kansas City, MO 64111  
(816) 889-5019  
(816) 889-5006 FAX

*Attorneys for Respondent*

## **CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

1. That the attached brief (a) includes the information required by Rule 55.03, and (b) complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 14,239 words, excluding the cover, this certification, the signature block and the appendices, as determined by WordPerfect 6.1 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 8th day of March, 2002, to:

Ms. Amy Bartholow  
Office of the State Public Defender  
3402 Buttonwood  
Columbia, MO 65201

---

Philip M. Koppe